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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 760

FRANK BOGLE et al.,
Petitioners,

vs.

JAKES FOUNDRY COMPANY,
Respondent.

PETITION FOR WRITS OF CERTIORARI

To the Court of Appeals of Tennessee, Middle Section, at Nashville.

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To the Court of Appeals of Tennessee, Middle Section, at Nashville.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Tennessee, Middle Section, at Nashville, entered in the above styled cause on December 11, 1959. The record in this case will be referred to as (R. ....), and consists of one volume, pages 1 through 254.[1]

[1] The original suit was filed in Part II of the Chancery Court for Davidson County, Tennessee, and was styled Jakes Foundry Company v. Tennessee-Carolina Transportation, Inc., Wilson Trucking Company, Viking Freight Co., Sartain O'Goin Motor Lines, Inc., Associated Transport, Inc., Pulaski Highway Express, Inc., Johnson

The opinion of the Court of Appeals of Tennessee (R. 197) is reported in 329 S. W. 2d 364, and printed in full in Appendix "A". A petition for certiorari to the Supreme Court of Tennessee was denied by that Court without opinion (R. 248).

JURISDICTION.

The decree of the Tennessee Supreme Court denying certiorari was entered on December 11, 1959, and the decision of the Court of Appeals of Tennessee, Middle Section, therefore became a final judgment rendered by the highest court of Tennessee in which a decision could be had.[2]

Jurisdiction of this Court rests upon 28 U. S. C., 1257 (3).

Freight Lines, Inc., Railway Express Agency, Roadway Express, Mason & Dixon Lines, Inc., Adkins Transfer Co., Inc., T-I-M-E, Inc., Hoover Motor Express Co., Inc., and Super Service Motor Freight Co. The suit sought to and did enjoin all of said common carrier motor vehicles, their agents, servants and employees "from failing and refusing to render continuous common carrier service as requested, and as said defendants did render prior to October 9, 1958, that is, from failing and refusing to pick up, transport and deliver outbound shipments from complainant *Jakes Foundry Company*, and from failing and refusing to accept, transport and deliver inbound shipments to the complainant's place of business, all as set out in the original bill . . . ." (R., 4, 5). The petitioners and carriers were found guilty of contempt of court and the injunction made permanent (R., 49, 50).

[2] At the conclusion of the hearings dealing with the contempt, the Chancellor ordered the injunction made permanent as against the defendant common carriers who refused to plead further, their agents, servants and employees. This was assigned as error in the appellate courts of Tennessee, and overruled, as follows:

"All of the assignments of error are overruled. The decree of the Chancellor is in all things affirmed. The costs of the cause are judged against appellants and the sureties on their appeal bonds." 329 S. W. 2d 364, 366.

The only matter remaining in this cause as to these appellants as agents, servants and employees was the enforcement of the fines assessed against them, and the injunction being made permanent, subjecting them to its ambit any time in the future (R., 49, 50).

QUESTIONS PRESENTED

1. Does a State Court have jurisdiction or power to enjoin union members, engaged in driving common carrier motor vehicles in interstate commerce, and beneficiaries of a collective bargaining agreement permitting them to respect picket lines, from a "mere refusal to cross another's picket line (maintained to support a lawful strike) which conduct by the proviso of Section 8 (b) [of the Federal Labor Management Relations Act of 1947, and carried in the 1959 amendments] is expressly declared not to be 'an unfair labor practice' ", on the sole ground that a refusal to cross such picket line interferes with duties imposed by state law on common carriers to serve all customers without discrimination.

(a) In view of those sections of the Labor Management Relations Act of 1947[3] [Section 8 (b) (4) as amended by the Labor-Management Reporting and Disclosure Act of 1959 contains the same provision][4], protecting the right of employees to refuse to enter the premises of another employer whose employees are engaged in a lawful strike; or

(b) In view of those sections of the Interstate Commerce Act[5] making it unlawful for any common carrier, motor vehicle to subject any person to any unjust discrimination, and giving the Interstate Commerce Commission exclusive primary authority to determine whether any discrimination has been engaged in, and giving the Federal District Court jurisdiction to enjoin such discriminatory activities upon application of Interstate Commerce Commission.

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[3] Section 7, the proviso of Section 8 (b), Section 13, Section 301 (a), and Section 502.

[4] 29 U. S. C. 158, 73 Stat. 542

[5] 49 U. S. C. A. § 316 (d), § 316 (e) and § 322 (b)

2. Does a State Court of equity have jurisdiction (by mandatory injunction) at the instance of an industry, engaged in interstate commerce, and in a suit brought against common carrier motor vehicles, their agents, servants and employees, to compel such agents, servants or employees to cross a picket line, lawfully advertising the existence of a strike against such employer by its employees, or on refusal, to punish them for contempt?

3. Does the conviction of members of a labor organization for contempt, of a state court injunction under the situation set forth in question 1 above, and a state court procedure which prohibits such union members or their local union from becoming a party to the basic litigation, and thusly to assert the deprivation of their Federal rights, deprive them of due process of law under the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are found in the Constitution of the United States, Article VI, second sentence, as follows:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

And Clause One of the Fourteenth Amendment, as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty and property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

Pertinent statutory provisions which are printed in Appendix B, *infra*, are as follows: Pertinent portions of the Labor Management Relations Act of 1947 (hereinafter referred to as the Act); 29 U. S. C. § 157, 61 Stat. 140; 29 U. S. C., 158 (b) (4), 61 Stat. 140; 29 U. S. C., § 163, 61 Stat. 151; § 501 (2) and 502 of the Labor Management Relations Act of 1947, 61 Stat. 161, 162; pertinent portions of the Interstate Commerce and Motor Carrier Act, 49 U. S. C., § 316 (d), 49 Stat. 558, as amended, 54 Stat. 924; 49 U. S. C., § 316 (e), 49 Stat. 558, as amended, 54 Stat. 924; 49 U. S. C., § 322 (b), 49 Stat. 564; Tennessee statutes relating to common carriers: T. C. A. §§ 65-422, 65-512, 65-514, 65-1523, 65-1524.

STATEMENT OF THE CASE.

Petitioners are truck driving employees of the common carrier defendants,[6] all members of Local 327, International Brotherhood of Teamsters, Chauffeurs, Helpers and Taxicab Drivers (hereinafter referred to as Local 327). Said Local 327 is the certified collective bargaining agent for all truck driving employees of the individual common carriers referred to, and has a collective bargaining agreement with all of the common carriers named in the original suit, one provision of which reads as follows:

"It shall not be a violation of this agreement, and it shall not be cause for discharge of any employee or employees to refuse to go through the picket line

[6] See Footnote 1, *supra*.

of a union, or refuse to handle unfair goods . . ." (R. 19, 151, 152).

The respondent, Jakes Foundry Company, is engaged in the manufacture and distribution of foundry products, steel castings, etc., and such manufacture and distribution constitutes an activity in interstate commerce as defined in the Act. Hoover Motor Express Company, Inc., and thirteen other like common carriers, by motor vehicle, were named as party defendants in the original suit, such common carriers having previously handled shipments in interstate commerce for the respondent.[7] These common carriers named in the original bill maintain "pick-up and delivery" services at respondent's Nashville plant. The carriers' employees are represented by Local 327.

Respondent, Jakes Foundry Company, became involved in a labor dispute with its employees, who were represented by Local 55, International Molders and Foundry Workers Union of North America, AFL-CIO.[8]

Jakes Foundry Company's employees were engaged in a strike ratified and approved by Local 55, International Molders and Foundry Workers Union of North America, AFL-CIO, whom respondent was bound to recognize under the proviso to Section 8 (b) (4) of the Federal Labor Management Relations Act.[9]

[7] Hoover Motor Express and other like common carriers have been subject to Interstate Commerce Commission. See 10 FCC, Page 64, 59 MCC 415; 9 FCC 181, 58 MCC 421; 8 FCC 64, 52 MCC 806; 11 FCC 501, MC 78632 (Sub. No. 95); 10 FCC 486, MC-78632 (Sub. No. 67); 7 FCC 110, 49 MCC 929; 3 FCC 11, 37 MCC 507; 1 FCC, Para. 7419, 27 MCC 719.

[8] See R., p. 22, amendment to plea in abatement, which is set out in Appendix "C" in full.

[9] The pertinent Federal statute is 29 U. S. C., 158 (b) (4) (

". . . Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own

International Molders and Foundry Workers pickets were placed at Jakes entrances. Truck drivers of the common carrier defendants, and members of Local 327, who are petitioners herein, exercised their rights under the collective bargaining agreement, and under the Labor Management Relations Act of 1947, and refused to cross the picket line, or handle freight consigned to or from Jakes Foundry.

As a consequence, Jakes Foundry filed suit in the Chancery Court for Davidson County, Tennessee, against Tennessee-Carolina Transportation, Inc., and thirteen other common carriers, which normally served Jakes plant. The petition asserted that the defendant common carriers, their agents, servants and employees were bound to render service to the public without preference or discrimination, and that their conduct in refusing to render their customary service to Jakes was in violation of common law and the statutes of Tennessee (T. C. A. 65-1523, 65-1524). A temporary injunction was issued and ran against the common carrier defendants, their agents, servants and employees.[19] When the petitioners herein, and members of Local 327, the collective bargaining agent for the common carrier defendants, refused to cross the picket line, both the petitioners herein, and the common carrier defendants were cited for contempt of Court.

employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this act . . . ." The Labor-Management Reporting and Disclosure Act of 1959 has the same provision in the Amended Sec. 8 (b) (4). 73 Stat. 543.

[19] Section 502 of the Act

"Nothing in this Act shall be construed to require an individual employee to render labor or services without his consent, nor shall any court issue any process to compel the performance of any individual employee to render services without his consent."

The petitioners and common carriers filed a plea in abatement to the attachment for contempt brought against them and set out that the State courts were without jurisdiction of the subject matter, or of the parties, exclusive primary jurisdiction having been vested in the National Labor Relations Board and or the Interstate Commerce Commission, and that unfair practice charges had been filed by the petitioners herein against Jakes Foundry Company, charging Jakes Foundry Company with unfair practices growing out of the conduct involved in this litigation (R., 22 to 25). The respondent, Jakes Foundry Company, filed a demurrer (R. 35) to the plea in abatement, which under Tennessee Law admits all of the allegations contained therein.[11] Said plea in abatement set out in part:

> "That all of said respondents are truck driving employees of the common carrier defendants named in the above styled cause, and are members of Local 327 of the International Brotherhood of Teamsters, Chauffeurs, Helpers, etc. (hereinafter referred to as Local 327), and that said Local 327 is the certified collective bargaining agent for all truck driving employees of the individual common carrier defendants, and that said Local 327 is a party to a collective bargaining agreement now in full force and effect with all of said common carrier defendants. Said agreement has a provision therein which reads as follows:
>
> > 'It shall not be a violation of this agreement, and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union, or refuse to handle unfair goods . . .'
>
> "That [your respondents are beneficiaries of this contractual provision, are fully familiar with the col-

[11] See *McBryer v. Dixie* etc., 176 Tenn. 500 (1940).

lective bargaining agreement or agreements above referred to, and that they are now cited for contempt to appear before this Honorable Court, and that prior to said citation these individual respondents discussed the matter of crossing the picket line at Jakes Foundry (original complainant) and had discussed in the past several years crossing picket lines in general, and that your individual respondents, acting in concert, wanted to give all of the mutual aid and protection they were capable of to the striking employees of Jakes Foundry Company, and the most effective way they knew to render this aid and assistance to the members of Local 55, International Molders and Foundry Workers Union of North America, AFL-CIO, which is and was on strike at Jakes Foundry (original complainant) place of business; was to refuse to cross their picket lines and thus aid and assist said labor organization and its members in their legitimate objectives.

"Respondents would further plea in abatement and show the fact that Local 55, International Molders and Foundry Workers Union of North America, AFL-CIO, is the certified bargaining representative of an appropriate unit of employees at Jakes Foundry Company (original complainant in this cause), having been certified by the National Labor Relations Board, and that said Local 55 is now on strike at Jakes Foundry Company and maintaining a picket line, and were so maintaining a picket line on the date of the original bill in this cause was filed; that said strike is ratified and approved by the proper representatives of Local 55, International Molders and Foundry Workers Union of North America, AFL-CIO.

"Respondents would further show and state to the Court that Jakes Foundry Company (the original complainant in this cause) is engaged in commerce,

or an activity affecting commerce within the contemplation of the National Labor Relations Act, as amended, and that the common carrier defendants are engaged in commerce, or an activity affecting commerce within the contemplation of the National Labor Relations Act, as amended."

Said plea in abatement was overruled, the demurrers sustained, and the petitioners introduced no proof and relied on their claimed Federal rights. The common carrier defendants introduced proof, which is a part of the record. At the hearing, petitioners and common carriers were convicted of contempt, and the injunction made permanent[12] (R. 35, 49, 50).

The common carrier defendants as of this time have not filed a petition for certiorari to this Court seeking a reversal of their conviction of contempt, or seeking a reversal of the permanent injunction.

FEDERAL QUESTIONS IN THE COURTS BELOW.

Petitioners filed a plea to the jurisdiction of the Chancery Court, reprinted *infra*, Appendix "C", alleging that the subject matter of the suit was governed by the Federal statutes above referred to, and that since unfair practice charges had been filed by these petitioners against this respondent, that the National Labor Relations Board had exclusive primary jurisdiction, and that the State Court had no jurisdiction either to hold petitioners in contempt or, to make the injunction permanent as against them (R. 20, 25).[13] The plea was overruled, the temporary injunc-

[12] The Trial Court ordered:

"It is further ordered that the temporary injunction heretofore issued against Super Service Motor Freight Co., . . . be and the same is hereby made permanent" (R. 49, 50).

[13] Unfair practice charges were filed by the petitioners herein against Jakes Foundry Company with the Tenth Region of the

tion having previously been issued, and said temporary injunction was made permanent (R. 42, 49, 50).

In both the Court of Appeals of Tennessee and in the petition for certiorari to the State Supreme Court, the petitioners herein asserted that the State Court was without jurisdiction of the subject matter of this suit or of petitioners, did not have power or authority to issue an injunction or make the same permanent, exclusive primary jurisdiction having been pre-empted by Federal legislation. That the acts and conduct of the petitioners were either proscribed activity under Section 8 of the Act, or protected activity under Section 7 of the Act (R. 153 et seq., Brief and Argument in the Court of Appeals of Tennessee, and R. 218 et seq., Brief and Argument in Supreme Court of Tennessee).[13]

National Labor Relations Board, Atlanta, Georgia, [illegible] part of the plea in abatement, and were pending [illegible] (R. 25). Said charges alleged violation of the Act as follows:

> "That the employer, Lakes Foundry Co., since on or about October 13, 1958, has interfered with, restrained and coerced the charging parties in the exercise of their rights guaranteed in Section 7 of the Act, by procuring an injunction in the Chancery Court of Davidson County, Tennessee, Part Two, seeking to compel the charging parties, who were exercising their right to assist labor organizations, and to engage in concerted activities for the mutual aid and protection of employees, to cease doing so. The nature of the conduct of the charging parties was refusing to cross the picket line of Local 55 International Molders and Foundry Workers Union of North America, AFL-CIO, who had a picket line at the employer's place of business. The employer secured a temporary mandatory injunction in said Court above referred to, requiring the charging parties and others to disregard the lawful and peaceful picket line above referred to, and ordering the charging parties to cross the same, depriving these employees of the opportunity to render the assistance above referred to."

[13] Paragraphs I [illegible] the questions presented, [illegible] were presented to the Supreme Court of the State of Tennessee (R. p. 225), and quoted verbatim from the petition for certiorari filed in *Teamsters et al. v. Kerrigan from Lakes*. Decision of the Supreme Court in *Teamsters v. Kerrigan* reported in 353 U. S. 968 (1957).

REASONS FOR GRANTING THE WRIT

The judgment below is in direct conflict with this Court's per curiam opinions in **Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local No. 327 v. Kerrigan Iron Works**, 353 U. S. 968 (1957); **General Drivers, etc. v. American Tobacco Company**, 348 U. S. 978 (1955); and the opinion in **San Diego Building Trades Council, etc., v. Garmon**, 359 U. S. 236 (1959); and **NLRB v. Rockaway News**, 345 U. S. 71 (1953).

The enactment by Congress of the "Labor Management Reporting and Disclosure Act of 1959", accentuates the problem presented by this petition for certiorari since the 1959 Act does not alter or change the provisions of Section 7 of the Labor Management Relations Act of 1947, and the 1959 Act carries the proviso to Section 8 (b) (4) into the new act. Substance is, therefore, given to the contention of petitioners herein that the decision in this case is in direct conflict with, and in deprivation of, rights guaranteed by the Labor Management Relations Act of 1947, Section 7 in particular, and impinges on the jurisdiction of the National Labor Relations Board in an attempt to prejudge or determine matters that are properly to be handled first by the Board:

> "When an activity is arguably subject to Section 7 or Section 8 of the Act, the state as well as the Federal courts must defer to the exclusive competence of the National Labor Relations Board, if the danger of state interference with national policy is to be averted." **San Diego Building Trades v. Garmon**, 359 U. S. 236, at p. 245 (1959).

This pronouncement of the intent of Congress was not new, but had been said in substantially the same manner

by this Court four years previously in **Weber v. Anheuser-Busch**, 348 U. S. 468 (1955):

> "Moreover, we must not forget that this case is not clearly one of 'unfair labor practices'. Certainly if the conduct is eventually found by the National Labor Relations Board to be protected by the Taft-Hartley Act, the state cannot be heard to say that it is enjoining the conduct for reasons other than those having to do with labor relations." *Supra*, at p. 480.

The proviso to Section 8 (b) (4) of the National Labor Relations Act has been recognized by this Court:

> ". . . clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so desire." **NLRB v. Rockaway News**, 345 U. S. 71 (1953).[15]

[15] The amicus curiae brief of the NLRB in the U. S. Supreme Court in the *American Tobacco Company* case at pp. 22-23 stated the position of the Board at that time:

> "Moreover, the sympathetic acts in which petitioners sought to have the motor carrier employees engage are far from being interdicted under the Act, as one protected by Section 7 thereof. Here, the picket line was established by the duly authorized bargaining representative of respondent's employees, and the union induced action by the motor carrier employees only at respondent's premises, the situs of the primary dispute. Furthermore, unlike the situation in *Ryan Stevedoring Co.*, the refusal of the carriers' employees to cross the line at respondent's factory was 'in obedience to any action by [their] union' (345 U. S. at 75); and rather than constituting disregard of their employers' instructions, their refusal was specifically sanctioned by the contract between the carriers and the Teamsters (Ibid. at 80).
>
> "In sum, the situation here, Congress has concluded, that a balance between the interest of employers, employees and the public is best achieved by leaving the carrier employees free to honor the picket line at respondent's premises, a result which would also be consistent with the contractual arrangement between the carriers and the union. The State Court, on the other hand, has obliterated this freedom and rejected the arrangement of the parties [illegible]

These petitioners and members of Local 327 were therefore effectively deprived of rights guaranteed in Section 7 of the Act:

> "... to assist labor organizations ... ; and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection."

and deprived of rights expressly recognized under the proviso to Section 8 (b) of the Act. If these Federal protected rights can be enjoined in the State Courts under State Court theories, and simply by failing to name the union as a party defendant (See **Kerrigan**, *supra*), then an easy method for the voidance of Federal rights has been discovered.[16]

2.

The questions presented involve serious questions of the sort which have arisen and will continue to arise out of the interaction between the Labor Management Relations Act and the Interstate Commerce Act, and the activities of State Courts under State Laws where the Federal Acts have proscribed certain activities, denominated others as protected, and established procedures by a specialized board or boards, to first determine the respective assertions of the parties affected.[17]

> tection to the interest of the employer than Congress decided appropriate in the circumstances presented."

See also *Cyril de Cordova, etc.*, 91 NLRB 1121, 1134-1139, where the Board holds the refusal to cross the picket line was protected by Section 7 and the proviso to Section 8 (b) (4).

[16] See *National Carloading Corporation v. Arkansas Motor Freight Lines, Inc.*, 201 Tenn. 250 (1957), where this exact method was applied.

[17] There are numerous cases pending in the Chancery Courts at trial level in the State of Tennessee where injunctions are pend-

The proscribed or protected activity dealt with under this heading has been explained in I, *supra*, and leaves only the question of the interference of the State Courts with matters governed by the Interstate Commerce Act, or Interstate Commerce Commission. Therefore, aside from the question of the paramountcy of Federal law, protecting or proscribing the rights of employees to respect picket lines, it would appear clear that the State Court was lacking in jurisdiction and power to attempt to adjudicate, in respect to motor carriers subject to the Interstate Commerce Act, the question of whether there exists some species of duty by State law under which such carriers are bound to make deliveries to any and all customers regardless of any strike circumstances that might be involved. The Interstate Commerce Act makes it unlawful for common carriers by motor vehicle, engaged in interstate commerce, to subject any customer to unjust or unreasonable discrimination [49 U. S. C. § 316 (d)]. It further provides [Sec. 316 (e)] that the Interstate Commerce Commission shall, upon complaint of an unjust discrimination, make an investigation and a determination as to whether there is in fact any unjust, unreasonable, or discriminatory practices engaged in. Section 322 (b) then provides for enforcement of orders or regulations of the Commission in this respect by injunctive process in the District Courts of the United States upon application to the Commission. By these procedures, the National Congress has pre-empted the field (other than safety of the

ing of the nature herein complained of, and which have been pending in some instances for a considerable period of time. See section for certiorari, October Term, 1958, *Douglas McCray et al. v. Maddin Radio Industries, Inc.*, and *Maddin Industries, Inc.*, p. 18. The Courts of Tennessee have consistently failed to recognize the doctrine of preemption as enumerated by this Court. See Labor Relations Reporter, 42 Analysis 40, p. 80. See also petition for certiorari in *Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local Union No. 327 et al. v. Keystone Iron Works, Inc.*, October Term, 1958, pp. 4-23.

highways), and has made either State Courts or State Administrative bodies powerless to act in the field.[18]

A final important question of Federal law determined by the Court below and in conflict with Federal legislation and applicable decisions of this Court, deals with jurisdiction of the Court below to issue a temporary injunction under the admitted facts, hold these petitioners in contempt and punish them, and then make such injunction permanent and subject them to future jeopardy.

It is to be noted that the sole and exclusive distinction between this case and the **Kerrigan** case is, that in the **Kerrigan** case, the Union itself was made a party by the original complainant, whereas, in this case, the suit was by name or style against the common carriers, their agents, servants and employees.

It is conceded here as in the state court that this case, insofar as it involves the conviction of contempt of these petitioners for violating a temporary injunction, is the same situation that existed in the **Aladdin** cases[19] except that in this case these petitioners set out in detail and quoted from Sections 7 and 8 (b) (4) of the Act, the rights of these petitioners granted by Federal legislation, and "when an activity is arguably subject to Section 7 or Section 8 of the Act, the state as well as the Federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." **San Diego Building Trades v. Garmon**, *supra*, at p. 229 (1959). These asserted Federal rights in the first pleading of these petitioners in the State Court were conceded by the respondent and the Court, but

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[18] See *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43 (1916), and *Great Northern, etc. v. Merchants Elevator Co.*, 259 U. S. 285 (1922).

[19] The *Aladdin cases* are reported in 355 U. S. 8 (1957), and 4 L. Ed. 2d 104 (1959).

it was held that the **Aladdin** cases controlled, both as to the contempt and the issuance of the permanent injunction.

The assertion by the State Court that the conviction of these petitioners for contempt is in conformity with **U. S. v. United Mine Workers,** 330 U. S. 258 (1947). Such is not so because the **United Mine Workers case** is not authority for the position taken either in the **Aladdin cases,** *supra,* or this case, nor is the **Aladdin case** or the **United Mine Workers case** to be construed as in conflict with **Amalgamated Association, etc. v. Wisconsin Employment Relations Board,** 340 U. S. 383 (1951), because the litigation involving the **United Mine Workers** was an action by the United States Government, and the National Labor Relations Act, by its very terms, excludes conduct by or action taken by the United States Government.

3.

There remains one fundamental question of constitutional due process set out in Question 3.

Under the rulings of the State Court, these petitioners were made parties, not by individual name, but as agents, servants and employees of the common carrier defendants.[20] They were convicted of contempt and the injunction made permanent as to them, as well as all other employees of the named common carriers. Suit against the members of an unincorporated association such as Local 327 may be maintained in Tennessee.[21] However, Local 327, or these employees, could not under Tennessee law be made parties by name in order to assert their federal rights since the case of **McBrayer v. Dixie,** etc., 176 Tenn.

See Footnote 16, *supra*

[20] See Footnote 1, *supra*

[21] See *Powers v. Journeymen Bricklayers Union No. 5,* 130 Tenn. 643 (1914).

508 (1940), holds that Local 327 could not intervene to assert Federal rights on behalf of itself or its members. Hence the reference herein is to the apparent easy method the State Court has found of depriving citizens of rights guaranteed by Federal legislation. This procedure is merely to name the common carrier defendants, their agents, servants and employees, and refuse to permit formal intervention of the employees, and then claim that they cannot assert Federally granted rights. It is submitted that this constitutes a deprivation of due process under the Fourteenth Amendment to the Constitution of the United States.

The Texas courts have answered this circuitous route of depriving citizens of Federally granted rights by holding that when a state Court exceeds its jurisdiction, as in this case, that it cannot punish for contempt, and that to hold otherwise would deprive citizens of the United States of Federally granted rights.[22] See **Twedell ex parte** (Texas Supreme Court, 1958), 309 S. W. 2d 834; 44 L. L. R. M. 2519.

The assertion is again made here, as it was made in the petitions in the **Aladdin cases**, *supra*, that the State Court was without jurisdiction to hold these petitioners in contempt of court, and in any event, was without jurisdiction to make the injunctions permanent. The assertion is further made by these petitioners that this Court should grant certiorari since the failure to grant certiorari in the second **Aladdin case** has resulted in the issuance of injunctions of the type herein complained of.[23]

[22] See first and second petitions for certiorari filed in *Douglas McCrary et al. v. Aladdin Radio Industries, Inc.*, *supra*.

[23] See Footnote 17, *supra*.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

.....

CECIL D. BRANSTETTER,
104 Stahlman Building,
Nashville 3, Tennessee.

Dated March ....., 1960.

Certificate of Service.

I, Cecil D. Branstetter, attorney for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that copies of the foregoing Petition for Certiorari and Appendices were this day served on adverse parties here in accordance with Supreme Court Rules 21 (1) and 33 by depositing the same in the U. S. Post Office at Nashville, Tennessee, with first-class mail postage prepaid addressed to counsel of record at his post office address as follows:

Hon. Judson Harwood, Attorney for Respondent, Nashville Trust Building, Nashville 3, Tennessee.

March ....., 1960.

.....

Cecil D. Branstetter.

APPENDIX "A".

Jakes Foundry Co.,

v. Davidson Equity.

Tennessee-Carolina
Transportation, Inc., et al.

Opinion.

The principal case above styled was a suit by a shipper against a number of common carriers by motor truck for an injunction to require them to continue rendering their customary carrier pick-up and delivery service at complainant's plant, which service they had stopped because of picketing at the plant. The Chancellor granted a preliminary injunction which, following the practice in equity, ran against "defendants and their agents and servants," and which was served on defendants.

None of the defendants filed any plea, demurrer or answer in the cause. Instead, a number of defendants and their employees, assuming to decide the matter for themselves, refused to perform the carrier service, and willfully disobeyed the Chancellor's injunction.

Complainant shipper filed petitions for attachments for contempt against the defaulting carriers, five in number, and against nine individuals, agents and servants of the carriers, setting out that they had refused to perform the carrier service, wilfully disobeyed the temporary injunction, and defied the authority of the court.

None of these carriers or individuals offered any defense or denial of the contempt charged. Instead, they filed pleas in abatement alleging that the Chancery Court had no jurisdiction of the subject matter upon the ground that it

involved a labor dispute which had been pre-empted from state control by federal power because it involved activity either protected by Section 7 or prohibited by Section 8 (b) of the Taft-Hartley Act [29 U. S. C. A., Secs. 157, 158 (b)].

Complainant demurred to these pleas; and hearings were had upon the contempt petitions, the pleas, demurrers, and proof offered by some of the carriers, none of the other defendants offering any proof. The Chancellor found four of the carriers guilty of contempt under the first petition and fined them $25.00 each. He found all five of them guilty under the second petition and fined them $50.00 each. He found seven of the individuals guilty under the first petition and fined them $5.00 each. He also found three of them guilty under the second petition and fined two of them $10.00 each and one of them $25.00.

All of the contemnors appealed, except William Brown, and have assigned errors here insisting that the Chancery Court had no jurisdiction of the subject matter of this suit; that it involved a labor dispute which had been pre-empted from state by federal power, because it involved activity either protected under Section 7 or prohibited under Section 8 (b) of the federal Act; and that the Chancellor's temporary injunction was void and might be contemned with impunity.

Counsel for appellant individuals concede that this case cannot be distinguished from the case of Aladdin Industries v. Associated Transport,* .... Tenn. App. ....., 298 S. W. 2d 770, on remand, ... Tenn. App. ....., 323 S. W. 2d 222, except in one particular. There, the refusals of the men to cross the other union's picket line were separate and in-

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* The writ of certiorari was denied October 19, 1959, by the United States Supreme Court *sub nom* Douglas McCrary et al. v. Aladdin Radio Industries, Inc., et al., ... U. S. ..., 4 L. Ed. 2d 164, 80 S. Ct. 117.

dividual, not "concerted", while here appellants, members of Teamsters Local 327, averred in their plea that their refusals were "concerted" and were made to assist the other union.

We think this is not a decisive difference. Such a matter might have been urged as a defense in the main suit, but, in our opinion, it cannot be urged as a defense or excuse for flouting the injunction and defying the Chancery Court as a usurper, as appellants did.

In all its essentials, the case before us is exactly similar to the contempt case of Aladdin Industries v. Associated Transport, supra. Appellants' arguments here are to the effect that that case was wrongly decided and should now be overruled by us. We are satisfied with that decision, and think it controls this case.

Appellants cite Amalgamated Association v. Wisconsin Emp. Rel. Bd., 340 U. S. 383, 95 L. Ed. 364, as authority for their contention that the conduct here enjoined had been pre-empted from state control by federal power, and that the Chancellor had no jurisdiction of the subject matter, and his temporary injunction was void and might be contemned with impunity.

We think that case affords no support for such contention. There, the state court enjoined a strike and adjudged the unions in contempt for violating a restraining order; and the Supreme Court of the United States reversed that judgment. But it appears that the only point there ruled was that the Wisconsin statute under which the state court acted was invalid as in conflict with the federal act.

So, that case is no precedent or authority for the point now urged by appellants, because that point was not considered or decided. "Questions which merely lurk in the record, neither brought to the attention of the court nor

ruled upon, are not to be considered as having been so decided as to constitute precedents.'" Kyos v. Associated Press, 299 U. S. 269, 279, 81 L. Ed. 183, 189.

To give Amalgamated Association v. Wisconsin Emp. Rel. Bd., supra, the construction urged by appellants, would, in our opinion, bring it into conflict with United States v. United Mine Workers of America, 330 U. S. 258, 91 L. Ed. 884 and the many other cases there cited.

All of the assignments of error are overruled. The decree of the Chancellor is in all things affirmed. The costs of the cause are adjudged against appellants and the sureties on their appeal bonds. The cause will be remanded to the Chancery Court for further proceedings not inconsistent with this opinion.

/s/ S. L. Felts,
Judge.

APPENDIX "B".

Pertinent Statutory Provisions.

29 U. S. C., Sec. 157. Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 158 (a) (3) of this title. As amended June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title I, Sec. 101, 61 Stat. 140."

29 U. S. C., Sec. 158 (b) (4). Unfair labor practices.

"To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain

with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. * * * *

" * * * **Provided**, That nothing contained in this sub-section shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter."

29 U. S. C., Sec. 163. Right to strike preserved.

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations of qualifications on that right. As amended June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title I, Section 101, 61 Stat. 151."

Labor-Management Relations Act of 1947, 61 Stat. 161, 162.

"Sec. 501 (2). The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees."

"Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

49 U. S. C., § 316 (d). Undue preferences or prejudices prohibited.

"All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory,

or description of traffic to any injust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: **Provided, however,** That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

49 U. S. C., 316 (c). Complaints to and investigation by commission; power of commission to fix reasonable rates, regulations, etc.

"Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 317 of this title. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and or express, and or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers, affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice, thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the pub

lic interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima, or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: **Provided, however**, That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

49 U. S. C., § 322 (b). Jurisdiction of district courts to restrain violations and enforce orders.

"If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof); or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto."

Tennessee Code Annotated, Section 65-422. Unjust practices and unsafe services prohibited.

> "No public utility shall adopt, maintain, or enforce any regulation, practice, or measurement which shall be unjust, unreasonable, unduly preferential or discriminatory, nor shall any public utility provide or maintain any service that is unsafe, improper, or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered by said commission. (Acts 1919, ch. 49, § 6; Shan. Supp., § 3059a 89; Code 1932, § 5452.)"

Tennessee Code Annotated, Section 65-512. **Special rate, rebate or drawback by common carrier or public service company prohibited—Preference in furnishing cars or motive power unlawful—Unjust discrimination.**

> "If any common carrier or public service company shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person a greater or less compensation for any services rendered in the transportation of any kind of property, or any person, or any service within this state than it charges, demands, collects, or receives from any other person for a like service in transportation or service of a like kind under substantially like circumstances and conditions, and if such common carrier or such other public service company, make any preference between the parties aforesaid, in furnishing cars or motive power or otherwise, such common carrier or other public service company, shall be guilty of unjust discrimination, which is prohibited and declared unlawful. (Acts, 1897, ch. 10, § 15; Shan., § 3059a40; mod. Code 1932, § 5416.)"

Tennessee Code Annotated, Section 65-514. **Preferences are unlawful.**

"It shall be unlawful for any such corporation to make or give an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic or service, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service to any undue or unreasonable prejudice or disadvantage. (Acts 1897, ch. 10, § 17; Shan., § 3059a42; Code 1932, § 5418.)"

Tennessee Code Annotated, Section 65-1523. **Injunction to compel compliance with law.**

"Said commission or the attorney-general, in the name of the state and acting upon request of said commission, or any interested party in his or its own name, is given the power and right by bill of complaint in any chancery court having jurisdiction of the parties, to seek injunctive relief, prohibitory or mandatory, or both, to compel compliance by any offending parties with any of the provisions of this chapter, or with any order, decision, rule, regulation, direction, demand or requirement made by said commission in pursuance of this chapter; and jurisdiction and power are conferred and duty is imposed upon the several chancery courts, in all proper cases, to declare, decree and award such injunctive relief. (Acts 1933, ch. 119, § 18; C. Supp. 1950, § 5501.20 (Williams, § 5501.18).)"

Tennessee Code Annotated, Section 65-1524. **Violation of chapter—Penalty.**

"Every officer, agent or employee of any corporation, or any other person who willfully and deliberately violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this chapter, shall be guilty of a misdemeanor, and upon conviction thereof for the first offense shall be

punished by a fine of twenty five dollars ($25.00); for the second offense shall be punished by a fine of fifty dollars ($50.00); and for the third offense be punished by a fine of one hundred dollars ($100) or by imprisonment for a period not exceeding one (1) year, or both, in the discretion of the court. Each day any such provision is violated shall constitute a separate offense.

"Every officer, agent or employee of any corporation and every other person who fails to obey, observe or comply with any order, decision, rule, regulation, direction, demand or requirement of said commission made in pursuance of the power and authority conferred by this chapter, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars ($500), or by imprisonment for not exceeding one (1) year, or both, in the discretion of the court. Each day any such order, decision, rule or regulation, etc., of said commission is violated, shall constitute a separate offense; and the fact that there may have been a prosecution for the violation of any such order, decision, rule or regulation, etc., of said commission under this section, shall not operate to prevent or limit the exercise of the authority of the commission to suspend, revoke, alter or amend certificates of convenience and necessity, interstate permits, and or contract hauler's permits as provided in this chapter. (Acts 1933, ch. 119, § 17; C. Supp. 1950, § 5501.19 (Williams, § 5501.17).)"

APPENDIX "C".

In the Chancery Court,
Part Two, at Nashville.

Jakes Foundry Co.,

vs.

Tennessee-Carolina Transportation, Inc., etc. et al.

Rule
No. 80312.

Amendment to Plea in Abatement.

Come the respondents, Clarence Hinkle, Luther R. Carroll, Robert E. Odom, Dorsey Melton, Foster O. Williams, Wiley Williams, Frank Bogle, Thomas Hethcote, Henry Farris, William Brown, and Virgil Jewell, appearing specially and for the sole purpose of challenging the jurisdiction of this Honorable Court and at the earliest opportunity, and for amendment to their plea in abatement to the attachment for contempt heretofore filed in this cause, say:

That all of said respondents are truck driving employees of the common carrier defendants named in the above styled cause, and are members of Local 327 of the International Brotherhood of Teamsters, Chauffeurs, Helpers, etc. (hereinafter referred to as Local 327), and that said Local 327 is the certified collective bargaining agent for all truck driving employees of the individual common carrier defendants, and that said Local 327 is a party to a collective bargaining agreement now in full force and effect with all of said common carrier defendants. Said agreement has a provision therein which reads as follows:

> "It shall not be a violation of this agreement, and it shall not be cause for discharge if any employee or

employees refuse to go through the picket line of a union, or, refuse to handle unfair goods.

That your respondents are beneficiaries of this contractual provision, are fully familiar with the collective bargaining agreement or agreements above referred to, and that they are now cited for contempt to appear before this Honorable Court, and that prior to said citation these individual respondents discussed the matter of crossing the picket line at Jakes Foundry (original complainant) and had discussed in the past several years crossing picket lines in general, and that your individual respondents, acting in concert, wanted to give all of the mutual aid and protection they were capable of to the striking employees of Jakes Foundry Company, and the most effective way they knew to render this aid and assistance to the members of Local 55, International Molders and Foundry Workers Union of North America, AFL-CIO, which is and was on strike at Jakes Foundry (original complainant) place of business, was to refuse to cross their picket lines and thus aid and assist said labor organization and its members in their legitimate objectives.

Respondents would further plea in abatement and show the fact that Local 55, International Molders and Foundry Workers Union of North America, AFL-CIO, is the certified bargaining representative of an appropriate unit of employees at Jakes Foundry Company (original complainant in this cause), having been certified by the National Labor Relations Board, and that said Local 55 is now on strike at Jakes Foundry Company and maintaining a picket line, and were so maintaining a picket line on the date the original bill in this cause was filed; that said strike is ratified and approved by the proper representatives of Local 55, International Molders and Foundry Workers Union of North America, AFL-CIO.

Respondents would further show and state to the Court that Jakes Foundry Company (the original complainant in this cause) is engaged in commerce, or an activity affecting commerce within the contemplation of the National Labor Relations Act, as amended, and that the common carrier defendants are engaged in commerce, or an activity affecting commerce within the contemplation of the National Labor Relations Act, as amended.

Respondents, therefore, say in accordance with their *original plea in abatement*, that this Honorable Court is without jurisdiction of the subject matter of this suit or of these respondents, jurisdiction having been pre-empted by valid Federal legislation, particularly the Labor Management Relations Act of 1947, 29 U. S. C. A. 141 et seq., and or the Interstate Commerce Act, particularly 49 U. S. C. A., Sections 316 (d), 316 (e) and 322 (b).

Respondents would further show and state to the Court that they have, prior to the filing of this petition, filed with the Tenth Region of the National Labor Relations Board in Atlanta, Georgia, unfair practice charges against Jakes Foundry Company (complainant herein) charging said Company with the violation of Section 8 (a) (1) of the Labor Management Relations Act of 1947. A copy of said charges are attached hereto and made a part of this plea in abatement.

Respondents, therefore, pray the judgment of this Honorable Court upon this plea, and that the petition for attachment for contempt as to them be dismissed at the cost of the petitioner therein.

Cecil D. Branstetter,
Attorney for Respondents

State of Tennessee,
County of Davidson.

Cecil D. Branstetter, being first duly sworn, makes oath that he is the attorney for the respondents named in the foregoing amendment to plea in abatement and that the statements made therein are true in substance and in fact.

Cecil D. Branstetter.

Sworn to and subscribed before me this ..... day of October, 1958.

.....
Notary Public.

My commission expires: .....